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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 97-158
Southwestern Bell Telephone Company	)	Transmittal No. 2633
	)	
Revisions to Tariff F.C.C. No. 73	)	

OPPPOSTION TO DIRECT CASE OF SOUTHWESTERN BELL TELEPHONE COMPANY

Sprint Communications Company L.P. ("Sprint") hereby opposes the Direct Case of Southwestern Bell Telephone Company ("SWBT") filed on August 13, 1997 in compliance with the Common Carrier Bureau's *Order Designating Issues for Investigation ("Investigation Order")* (DA 97-1472), released July 14, 1997. In support thereof, Sprint states as follows.

On May 1, 1997, SWBT proposed to add a new section to its access tariff under which it would offer "application-specific rate packages" in response to requests for proposals ("RFPs"). SWBT stated that it had received RFPs from AT&T and Coastal Telephone Company. The proposed RFP pricing would allow SWBT to offer individual customers special access services using the same facilities as those used to provide its other tariffed services at rates far below its generally available tariffed rates.

On June 13, 1997, the Common Carrier Bureau suspended SWBT's transmittal, and on July 14 released its *Investigation Order*. The Bureau seeks information on whether the

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proposed RFP pricing violates the Commission's policies concerning the offering of contract tariffs by dominant LECs, the *DS-3 ICB Order,* or Section 69.3(e)(7) concerning averaged rates. The Bureau also seeks comments on whether the competitive necessity doctrine can be used to justify the proposed RFP pricing and whether SWBT satisfied the requirements.

As discussed below, Transmittal No. 2633 violates the Commission's rules and policies concerning the offering by LECs of service pursuant to contract tariffs, the *DS-3 ICB Order,* and Section 69.3(e)(7); and SWBT falls far short of justifying these violations by its attempted reliance on the competitive necessity test.

I. ISSUE 1: TRANSMITTAL NO. 2633 VIOLATES THE COMMISSION'S POLICIES PROHIBITING DOMINANT LECs FROM OFFERING CONTRACT TARIFFS.

In its *Investigation Order,* the Commission explains that its rules provide for the provision of contract tariffs by interexchange and non-dominant carriers only; that dominant LECs "may not offer a contract tariff;" and that RFP tariffs are "a type of contract tariff" (Para. 17). It is clear, therefore, that dominant LECs may not offer RFP tariffs.

The *Investigation Order* is clearly correct in pointing out that the Commission's rules prohibit the use of contract tariffs by dominant LECs. The only instance where the Commission has authorized the use of a contract tariff by a dominant carrier was under specific circumstances relating to AT&T. The Commission found that sufficient competition existed for certain AT&T business services to justify regulatory changes, and it permitted AT&T to offer services which were subject to further streamlining pursuant to

individually negotiated contract tariffs. *Interexchange Order*, 6 FCC Rcd 5880, 5897 (1991).

The Commission never extend this authority to dominant LECs. Rather, the Commission has proposed permitting incumbent LECs to offer contract tariffs and competitive response tariffs only when Phase I (Potential Competition) competitive triggers have been met. *Access Reform NPRM,* 11 FCC Rcd 21354, 21439-40 (1996). The fact that the Commission is currently considering whether such LECs should be afforded this authority only under circumstances and when certain hurdles have been met destroys SWBT's argument that RFP tariffs are not prohibited to dominant LECs. The pendency of this proceeding shows that the Commission is only now contemplating removal of such prohibition (which would obviously be unnecessary if the prohibition did not exist), and such contemplation is limited to circumstances where certain Phase I competitive triggers have already been met. There is no suggestion by SWBT that even if the Commission had adopted its proposal that it would qualify for a lifting of the prohibition or that it could support a showing that it has met the Phase I competitive triggers.

While SWBT argues, without support, that its RFP tariff is not a contract tariff (at 3), the Commission, as noted above, considers "competitive response tariffs" to be contract tariffs. In the *Access Reform NPRM,* the Commission referred to "a competitive response tariff ... [as] a contract tariff that a LEC initiates when it responds to a competitor's offer to an end user or in response to a request for proposal." 11 FCC Rcd at 21439.

II. ISSUE 2: TRANSMITTAL NO. 2633 VIOLATES THE DS-3 ICB ORDER.

In response to the issue of whether Transmittal No. 2633 violates the *DS-3 ICB Order,* SWBT claims that it did not "file its Transmittal No. 2633 as an ICB tariff" (at 3). The issue here is not what SWBT has called its transmittal. SWBT is proposing to offer individualized pricing for access services. If allowed to do so, SWBT would be offering the same access service under both generally available tariffed rates and individualized rates. In its *DS-3 ICB Order,* the Commission specifically found the use of both types of pricing for the same services to be discriminatory, stating "the simultaneous use of averaged cost rates for some facilities and individual cost rates for other facilities would result in unreasonable discrimination." 4 FCC Rcd 8624, 8643 (1989). SWBT cannot avoid the Commission's finding in the *DS-3 ICB Order* by claiming that it did not call its proposed offering an "ICB" tariff.

III. ISSUE 3: TRANSMITTAL NO. 2633 VIOLATES SECTION 69.3(e)(7) OF THE COMMISSION'S RULES.

The Commission has requested comments on whether Transmittal No. 2633 violates the requirement that dominant LECs not deaverage their rates within a study area. SWBT claims that the Commission has made exceptions to this rule in the past (*e.g.,* zone density pricing) and "the competitive necessity doctrine is merely another one of those exceptions" (at 4). In the case of zone density pricing, the Commission issued Section 69.123(c) to explicitly permit this exception. There is no rule here for the exemption sought by SWBT. Instead, SWBT would require a waiver of Section 69.3(e)(7) to tariff an RFP offering.

In order to receive a waiver of the Commission's rules, SWBT must overcome the high hurdles for the grant of such waivers. *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). Although SWBT requested a waiver of any of the rules necessary for the filing to take effect, it failed to support its request. The Bureau, therefore, properly denied the request (Para 14).

IV. ISSUE 4: THE COMPETITIVE NECESSITY DOCTRINE APPLIES BUT SWBT HAS FAILED TO SATISFY ITS REQUIREMENTS.

The Commission seeks comment on whether it should be "required to craft a competitive necessity defense that is available in all circumstances, or whether [it] could reasonably find that the competitive necessity defense is not always available" (Para. 25).

In the *Private Line Guidelines Order,* 97 FCC 2d 923 (1984), the Commission found that carriers could vary their rates from the established rates if they could justify their rates under the competitive necessity doctrine. Thus, the competitive necessity doctrine is available to dominant LECs that meet the following three prong test:

> (1) an equal or lower priced competitive alternative - a similar offering or set of offerings from other common carriers or customer-owned systems - is generally available to customers of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and (3) the volume discount contributes to reasonable rates and efficient services for all users. 9 FCC 2d 948.

SWBT has failed to satisfy any of the three prongs of the Commission's test.

As an initial issue, the Commission questions whether the competitive necessity test, which was developed to allow AT&T to offer volume discounts for private line service when competition was perceived to be growing, should also apply to dominant LECs as a defense to discrimination (Para. 24). In 1984 when the Commission issued its

Private Line Guidelines Order, there had already been competition in the private line market for over a decade.

SWBT provides no evidence that the local access market is subject to meaningful competition or that the competition which ostensibly exists is even close to the degree of competition for private line service faced by AT&T in 1984. The market figures it provides reflect only two cities (Dallas and Houston) and one service ("high capacity"); the market share it shows for AT&T is for switched services, not private line services. Since the competitive necessity doctrine was being applied to an offering of private lines, AT&T's market share for switched services is simply irrelevant. And, consequently, the Commission did not consider or rely upon AT&T's market share or market power in the provision of switched services.

Assuming, *arguendo*, that the competitive necessity doctrine applies, SWBT must meet the three prongs of the test. In order to meet the first prong, SWBT must demonstrate that lower priced competitive alternatives are generally available to the customers of the discounted offering. *Id.* at 948. SWBT must demonstrate that its competitors have adequate facilities which can be used to provide the services required by the RFP[1] and that its competitors have provided similar services at discounted rates.

SWBT argues that the Court affirmed SWBT's "inability to satisfy a strict interpretation of its first prong;" that "the Commission is prohibited from strictly interpreting the first prong against SWBT;" and that the Commission must allow SWBT to

[1] Sprint doubts that any other carrier could immediately provide the volume of service requested by AT&T. Competitors of SWBT would probably have to build facilities to meet the requirements of the RFP.

satisfy the test "as SWBT has done" (at 9). The Court's decision, however, did not reach that far. Rather, it found the Commission's conclusion that "the existence and degree of competition might be determined by the existence of responses to a [request for proposal]" placed SWBT in "a classic Catch-22 situation" because it could not obtain competitors' bids without violating antitrust laws and without their bids it could not prove the degree of competition. But the Court does not absolve SWBT from meeting the first prong by at least demonstrating that there are other carriers having the adequate facilities to compete to provide the services required by the RFP.

SWBT is also incorrect in suggesting that the Court found that the RFP by the potential subscriber would alone be sufficient to meet the first prong of the competitive necessity test. The Court made no such finding. Rather, it simply remanded this proceeding to the Commission so that the Commission could provide a fuller explanation of its actions.

In support of its transmittal, SWBT calculated the price of the service requested by AT&T under the tariffs of Teleport Communications Group, Inc. and GST Telecommunications. The Bureau noted that it could not validate SWBT's calculations and "require[d] SWBT to identify the specific rate that corresponds to each rate element that it uses in its price calculation." (Para. 29) SWBT has failed to meet this requirement.

Also part of the first prong is a demonstration that the prices charged by competitors are at or below those charged by SWBT. SWBT has failed to meet this requirement as well. SWBT states that Time Warner may offer DS-3 service at $677.09 per month, and MFS at $1800 per month. However, these rates are apparently contract

rates with no indication of the distance, facilities, or terms and conditions involved. Clearly, this showing is inadequate.

SWBT claims to have met the second prong of the competitive necessity test and states that it is offering service to AT&T and Coastal Telephone at rates of $700 and $772, respectively. SWBT does not state what service it is referring to here. This is the first documentation of these rates, and it is unclear how they relate to the bundled rates proposed in Transmittal No. 2633.

In its Petition, Sprint argued that the proposed rates would be unavailable to other customers because it is highly unlikely that another carrier would require an identical bundled set of facilities at the same locations. As Sprint previously pointed out in its Petition to Reject, the Commission has historically viewed the bundling of services as a vehicle for a carrier to engage in unlawful discrimination and has required that "a rate element which appears separately in one rate structure should appear separately in all other rate structures." 97 FCC 2d at 934. Thus, the bundling of rates and the geographic restrictions render the proposed offering unduly discriminatory.

SWBT claims that it did not make the rates more generally available because it did not have evidence of competition and an extension would not meet the competitive necessity test (at 13). SWBT's argument stands the test on its head. What it argues, in effect, is that the lack of competition in Dallas and Houston is such that it could only justify the reduction in rates for two specifically targeted customers, and was therefore entitled to discriminate against all other customers. But it is to avoid this type of targeted discrimination that the test requires (in the first prong) that a minimum threshold of

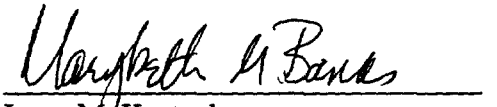
competition exists before the Commission will allow a reduction in rates to particular customers that are withheld from other customers.

Concerning the third prong and whether the discount contributes to reasonable rates for all users, Sprint again points out that the revenue loss (or discount) for AT&T's RFP offering is 64 percent (Sprint Petition at 2). Assuming, *arguendo*, that the proposed RFP rate covers only direct costs and the difference between the RFP revenue and the tariffed rates revenue is the overhead, the overhead is 177 percent (64%/36%). This overhead, which is underestimated by this calculation, is clearly unreasonable. Thus, it is not clear how the proposed RFP rate could reasonably be expected to cover direct costs and make some contribution to overhead costs.

In sum, SWBT has failed to satisfy the prongs of the competitive necessity test, and the Commission must reject the transmittal.

Respectfully submitted,

Sprint Communications Company L.P.



Leon M. Kestenbaum
Marybeth M. Banks
1850 M Street, N.W., Suite 1110
Washington, D.C. 20036
(202) 857-1030

August 28, 1997

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **OPPOSITION TO DIRECT CASE BY SOUTHWESTERN BELL TELEPHONE COMPANY** of Sprint Communications was Hand Delivered or sent by United States first-class mail, postage prepaid, on this the 28th day of August, 1997 to the following parties:

Joan A. Hesler

Jim Schlicting, Chief*
Competitive Pricing Division
Common Carrier Bureau
Federal Communications Comm.
1919 M Street, N.W., Room 518
Washington, D.C. 20554

International Transcription Service
1919 M Street, N.W.
Washington, D.C. 20554

Judy Nitsche, Chief
Tariff and Price Analysis Branch
Room 518
Common Carrier Bureau
1919 M Street, N.W.
Washington, D.C. 20554

Jim Lichford
Competitive Pricing Division
Room 518
Common Carrier Bureau
1919 M Street, N.W.
Washington, D.C. 20554

Robert M. Lynch
Durward D. Dupre
Thomas A. Pajda
Southwestern Bell Telephone
One Bell Center
Room 3520
St. Louis, MO 63101

Ava B. Kleinman
Mark C. Rosenblum
Seth S. Gross
AT&T Corporation
295 No. Maple Avenue
Room 3252J1
Basking Ridge, NJ 07920

Don Sussman
Regulatory Analyst
MCI
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006